

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTONIO CAPOLOGO,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	21-CV-1469 (VEC) (SDA)
	:	
	:	<u>ORDER ADOPTING</u>
CYNTHIA BRANN and PATSY YANG,	:	<u>REPORT &</u>
	:	<u>RECOMMENDATION</u>
Defendants.	:	
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VALERIE CAPRONI, United States District Judge:

WHEREAS on February 18, 2021, Plaintiff Antonio Capolongo filed a complaint (the “Complaint”) against Defendants Cynthia Brann, then Commissioner of the New York City Department of Correction, and Patsy Yang, Senior Vice President of Correctional Health Services, Dkt. 1;¹

WHEREAS the Complaint, brought pursuant to 42 U.S.C. § 1983, alleged that while Plaintiff was being detained at the Vernon C. Bain Center between January 6 and May 26, 2021, Defendants failed adequately to protect him from the risk of contracting COVID-19, in violation of his constitutional rights under the Eighth and Fourteenth Amendments, *see id.* at 3;

WHEREAS on May 18, 2021, this Court referred this case to Magistrate Judge Aaron for general pretrial management and, on October 20, 2021, for the preparation of a report and recommendation (“R&R”) on any dispositive motion, *see* Dkts. 7, 12;

WHEREAS on January 14, 2022, Defendants answered the Complaint and the parties proceeded to discovery, *see* Dkt. 22;

¹ Although Plaintiff filed his Complaint *pro se*, he was represented by counsel during discovery and in opposition to Defendants’ motion for summary judgment. *See* Dkt. 32.

WHEREAS on February 7, 2023, Defendants moved for summary judgment, which Plaintiff opposed, Dkts. 46, 51;

WHEREAS on May 19, 2023, Judge Aaron entered an R&R recommending that the Court grant Defendants' motion for summary judgment because Plaintiff failed to exhaust administrative remedies and, even if he had exhausted his administrative remedies, he failed to raise a genuine dispute of material fact on the merits, *see* R&R at 10–11, Dkt. 53;

WHEREAS in the R&R, Judge Aaron notified the parties that, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), they had fourteen days to file written objections to the R&R's findings, *id.* at 14;

WHEREAS Judge Aaron further noted that failure to file objections would result in both the waiver of objections and the preclusion of appellate review, *id.*;

WHEREAS no objections were filed by either party;

WHEREAS in reviewing an R&R, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge,” 28 U.S.C. § 636(b)(1)(C);

WHEREAS when, as here, no party objects to the R&R, the Court may accept the R&R provided that “there is no clear error on the face of the record,” *Heredia v. Doe*, 473 F. Supp. 2d 462, 463 (S.D.N.Y. 2007) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)); *see also* Fed. R. Civ. P. 72(b) advisory committee's note;

WHEREAS an error is clear when the reviewing court is left with a “definite and firm conviction that a mistake has been committed,” *see Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (quoting *McAllister v. United States*, 348 U.S. 19, 20 (1954)); and

WHEREAS careful review of the R&R reveals that there is no clear error;


IT IS HEREBY ORDERED that the R&R is adopted in full, Defendants' motion for summary judgment is GRANTED, and this case is DISMISSED with prejudice.

Because the R&R gave the parties adequate warning, *see* R&R at 14, the failure to file any objections to the R&R precludes appellate review of this decision, *see Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."). Because appellate review is precluded, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith, and, therefore, permission to proceed *in forma pauperis* for purposes of appeal is denied.

IT IS FURTHER ORDERED that the Clerk of Court is respectfully directed to terminate all open motions and to CLOSE this case. The Clerk is further directed to mail a copy of this Order to Plaintiff and to note the mailing on the docket.

SO ORDERED.

Date: August 22, 2023
New York, New York



VALERIE CAPRONI
United States District Judge